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No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corp.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corporation move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner Sprint/United Management Company. Consent to the filing of this *amicus* brief was granted by counsel for petitioner but was denied by counsel for respondent.

AT&T Mobility, Honeywell, and Lockheed Martin are three of the nation's leading corporations. AT&T Mobility (formerly Cingular Wireless LLC, and now part of AT&T Inc.) is the largest wireless company in the United States, serving about 61 million customers. Honeywell is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. Lockheed Martin is principally engaged in the research, design, development, manufacture, integration, and sustainment of advanced technology systems, products and services. Its primary customers are agencies of the Government; among other things, Lockheed Martin produces combat aircraft, the Presidential helicopter, weapons systems, spacecraft, and other defense and civil products, and provides a range of logistical, training, and information services.

This case presents issues of great concern to businesses around the country, including *amici*, which are three of the largest employers in the Nation. AT&T Mobility has over 65,000 employees in the United States. Honeywell has about 118,000 employees, of whom approximately 56,000 are in

the United States. Lockheed Martin employs about 140,000 individuals around the world, the majority of whom are located in the United States. All three companies employ thousands of workers in states located within the Tenth Circuit: AT&T Mobility has approximately 3,760 employees in those states; Honeywell has about 3,880; and Lockheed Martin has nearly 11,100. Like most companies, *amici* have instituted human resources policies and practices designed to keep unlawful discrimination out of the workplace.

Nevertheless, *amici*—like most large businesses in this country—face a steady stream of employment discrimination lawsuits. The question presented here is an issue of recurring and substantial importance to *amici* and other employers that must defend against such lawsuits: whether a district court is required to admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff. In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for *amici* and all other employers; as we explain in our accompanying brief, that rule dramatically expands both the scope of liability and the costs of employment discrimination litigation.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Amici Curiae AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corp.

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BRIEF OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amici AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corporation are three of the nation's leading corporations. AT&T Mobility (formerly Cingular Wireless LLC, and now part of AT&T Inc.) is the largest wireless company in the United States, serving about 61 million customers. Honeywell is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. Lockheed Martin is principally engaged in the research, design, development, manufacture, integration, and sustainment of advanced technology systems, products and services. Its primary customers are agencies of the Government; among other things, Lockheed Martin produces combat aircraft, the Presidential helicopter, weapons systems, spacecraft, and other defense and civil products, and provides a range of logistical, training, and information services.[1]

This case presents issues of great concern to businesses around the country, including *amici*, which are three of the largest employers in the Nation. AT&T Mobility has over 65,000 employees in the United States. Honeywell has about 118,000 employees, of whom approximately 56,000 are in the United States. Lockheed Martin employs about 140,000 individuals around the world, the majority of whom are lo-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

cated in the United States. All three companies employ thousands of workers in states located within the Tenth Circuit: AT&T Mobility has approximately 3,760 employees in those states; Honeywell has about 3,880; and Lockheed Martin has nearly 11,100. Like most companies, *amici* have instituted human resources policies and practices designed to keep unlawful discrimination out of the workplace.

Nevertheless, *amici*—like most large businesses in this country—face a steady stream of employment discrimination lawsuits. The question presented here is an issue of recurring and substantial importance to *amici* and other employers that must defend against such lawsuits: whether a district court is required to admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff. In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for *amici* and all other employers; as we explain, that rule dramatically expands both the scope of liability and the costs of employment discrimination litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. On its surface, this case may appear to be about nothing more than an erroneous application of the rules of evidence. But on a fundamental level, it is about much more: whether, in an individual disparate treatment case, a company's liability may turn on allegations of discrimination made by non-parties.

By creating a *per se* rule that a plaintiff must always be allowed to introduce testimony by non-parties that the employer discriminated against them—even when there is no connection between the employment decision the plaintiff is challenging and the decisions affecting the non-party witnesses—the Tenth Circuit has in effect altered the scope of liability under the federal anti-discrimination laws. Employ-

ers face the risk of being held liable not only (or, indeed, not at all) for their conduct with respect to the plaintiff, but rather for alleged discrimination towards persons not before the court. To guard against this risk, employers will be forced not only to defend the claim being litigated, but also to refute the allegations of all of the non-party employees who have been called to testify about their own allegations of discrimination—and they will have to do so in case after case in which this traveling show of witnesses is called upon to perform.

The decision below also encourages juries to punish employers for conduct directed at non-parties. The prejudice and harm that results from allowing juries to consider conduct that bears no relevance to the plaintiff's own claims implicates due process concerns of the type most recently recognized by this Court in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). As in the punitive damages context, fundamental fairness requires that employers not be subjected to an unreasonable risk of being held liable and/or punished because of conduct directed at non-parties.

In sum, the Tenth Circuit's decision transforms the scope of liability under the anti-discrimination laws—a serious consequence that calls for this Court's intervention.

2. Moreover, the petition demonstrates that there is a well-developed conflict among the circuits on this recurring issue of employment law. Because the existence of this conflict creates incentives for plaintiffs to engage in forum shopping, this Court should grant certiorari now to resolve the conflict.

ARGUMENT

I. REVIEW IS WARRANTED TO ADDRESS THE IMPORTANT QUESTION OF FEDERAL EMPLOYMENT LAW RAISED BY THE DECISION BELOW.

A. The Tenth Circuit's Rule Effectively Requires Employers To Defend Themselves Against Multiple, Unrelated Allegations Of Discrimination In Every Individual Lawsuit.

In practical operation and effect, the Tenth Circuit's decision serves to expand the scope of *substantive* liability under the federal anti-discrimination laws.

1. Under the federal statutes prohibiting discrimination in employment, the focus is—as it should be—on the employment decision affecting the plaintiff herself. Thus, under the ADEA, when "a plaintiff alleges disparate treatment"—as in this case—"'*liability depends on* whether the protected trait * * * actually motivated the employer's decision.' * * * That is, the *plaintiff's* age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)) (emphasis added; brackets in original); *see also* Pet. for Cert. 6–7.

But the Tenth Circuit's decision moves the focus away from the employment decision that the plaintiff is challenging. The Tenth Circuit's rule allows individual plaintiffs—by the mere expedient of alleging a "company-wide policy" of discrimination (Pet. App. 8a)—to evade the requirements of a pattern-and-practice claim and nevertheless introduce the testimony of other employees who "apparently believe[] [that] they too were victims of * * * discrimination." *Id.* at 2a; *see also id.* at 20a (Tymkovich, J., dissenting) ("The larger problem with the majority's position is it suggests that anecdotal

evidence from employees throughout a large organization will be *per se admissible* when offered in the context of alleged discrimination in a [reduction in force].").

Under such a rule, in virtually every employment discrimination lawsuit the company will be put on trial not only for its actions towards the plaintiff herself, but also for how it treated any other employee who testifies that he or she was a victim of discrimination. This wide-angle lens captures both employees who worked within the same supervisory chain as the plaintiff—and whose testimony may be relevant (*see* Pet. for Cert. 7–8)—and employees who worked for different supervisors in different departments (indeed, perhaps in different cities or states)—whose testimony would have no bearing on the decision concerning the plaintiff.

Because this rule mandates admission of any non-party claim of discrimination as a matter of law, it distorts the substantive grounds on which a company may be held liable for violating the ADEA and other anti-discrimination laws. No longer would a plaintiff's claim stand or fall on its own merits. Rather, the fates of the plaintiff's claim and the employer's defense would each be inextricably linked to other employees' separate claims. Testimony by such witnesses bears no logical connection to whether unlawful discrimination motivated the adverse employment decision about the plaintiff. Nevertheless, such allegations have the power to inflame a jury's passions while distracting the jury from the task properly before it.

Moreover, the Tenth Circuit's rule may force an employer to square off not against the plaintiff herself, but rather against a "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be," because plaintiffs are able to "strike [defendant] with selective allegations, which may or may not have been available to individual named plaintiffs." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.) (recognizing procedural unfair-

ness of having to defend against a class action involving "fictional composite" plaintiff).[2] These concerns are even greater in the context of an individual lawsuit that—as here—does not allege a "pattern and practice" of discrimination. As the Seventh Circuit recently explained in a similar setting, the use of "statistical evidence" showing that most of the workers laid off in a reduction in force were over the age of 40 is immaterial to a plaintiff's claim that he had been discriminated against in the absence of evidence that the other employees were "similarly situated" and shared a "common supervisor." *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490–92 (7th Cir. 2007) (citation and internal quotation marks omitted); *see also id.* at 492 (noting that "[s]tatistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods."). The decision below invites the same type of logically unconnected comparisons, by allowing an individual plaintiff to bolster his case with facts from other incidents involving other decisionmakers.

Furthermore, by force of numbers, the employer is placed at a distinct—and perhaps insuperable—disadvantage. The plaintiff's own case, no matter how weak, will be strengthened significantly by the vivid, passionate allegations of discrimination recited by other employees of the company. That will be the case regardless of the merits of the non-

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[2] Describing concerns similar to those expressed in *Broussard*, Judge Posner has explained: "In effect the appeal asks us to graft [one named plaintiff's] timely filing with the EEOC onto [another named plaintiff's] untimely but not-yet-shown-to-be-unmeritorious discrimination case to create a composite plaintiff to represent the class of blacks denied employment by the defendant. We cannot find any basis in law or good sense for such ghastly surgery. Neither plaintiff is a suitable class representative, and zero plus zero is zero." *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999).

parties' allegations. Despite the lack of connection to the plaintiff's own claims, the steady drumbeat of allegations of discrimination will have the foreseeable effect of reinforcing the plaintiff's claim, thereby unduly prejudicing the employer. Thus, as one district judge explained in a frequently cited opinion, even the "strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980) (table).

2. The practical consequence of the Tenth Circuit's rule is to make employment litigation more protracted and expensive. A company will be forced to refute the allegations of every non-party witness who claims to be the victim of discrimination. As one practitioner has explained, "if such ["me, too"] testimony is admitted, the defendant would have the Hobson's choice of defending each situation or leaving the testimony unrebutted, either of which is prejudicial." Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 829 (1999). In short, every such witness will trigger a trial-within-a-trial.

Indeed, even a small contingent of former employees who claim discrimination would take on outsized importance at trial.[3] To place these complaining witnesses in their proper context vis-à-vis the entire workforce, an employer would need to offer its own witnesses to testify about the decision-

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[3] The facts in this case are illustrative. The plaintiff hand-picked five witnesses who were prepared to testify that they were discriminated against by other decisionmakers at Sprint. These individuals were among the approximately "15,000 employees [who] were released" by Sprint as part of the reduction in force over an 18-month period. Pet. for Cert. 2. In other words, these five witnesses represented a minuscule percentage of those who were laid off.

making process for each and every witness, as well as for the many employees affected by the job action who have not claimed to have been victimized by discrimination. And it might also need to introduce evidence about the individuals within the protected class who were not affected by the job action. Conceivably, a company could—and perhaps should—offer such testimony from dozens of its current and former employees. Even that might not suffice to counter the indelible impression created by a handful of non-party witnesses who accuse the company of discriminating against them.

Moreover, such extensive trial proceedings will not come cheaply, imposing substantial and unwarranted litigation costs on companies regardless of the merits of the plaintiff's *own* claims.[4]

B. By Inviting Juries To Base Liability For Discrimination On Acts Allegedly Directed Against Non-Parties, The Tenth Circuit's Rule Is Fundamentally Unfair.

The Tenth Circuit's rule also is troublesome because it invites juries to impose liability for alleged harms to parties not before the district court—thereby threatening companies' right to a fair trial. This Court identified similar concerns earlier this Term in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), explaining that "fundamental due process concerns" are raised when a jury "use[s] a punitive damages verdict to punish a defendant directly on account of harms it is

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[4] The costs associated with employment litigation are already substantial. "[O]nce a case is in court, it's expensive. A company can easily spend $100,000 to get a meritless lawsuit tossed out before trial. And if a case goes to a jury, the fees skyrocket to $300,000, and often much higher. The result: Many companies today are gripped by a fear of firing." Michael Orey, *Fear of Firing: How the threat of litigation is making companies skittish about axing problem workers*, BUS. WEEK (Apr. 23, 2007), at 54.

alleged to have visited on nonparties." *Id.* at 1063, 1064. In particular, the Court noted three concerns in the context of the jury's punitive damages award: the "risks of arbitrariness, uncertainty and lack of notice." *Id.* at 1063. Here, those concerns are, if anything, heightened because the plaintiff seeks to prove her *own* cause of action by reference to alleged acts directed at others. Although petitioner does not frame the issue in Due Process terms, it nonetheless remains "important for a court to provide assurance that the jury will ask the right question, not a wrong one." *Id.* at 1064. Yet the rule announced below virtually ensures that juries will ask—and answer—the wrong question. Rather than focusing on the merits of the specific allegations of the plaintiff at hand, juries are invited to base their finding of liability and "punish [a defendant] for harm caused [to] strangers [to the litigation]." *Id.*

This Court did hold in *Williams* that, in the context of assessing punitive damages, evidence of harm to others arising from the same conduct "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* But evidence of *different* conduct aimed at nonparties has no role to play in setting punitive damages (*see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003)), much less in determining liability in an individual disparate treatment case. In an individual employment lawsuit, the plaintiff does not—and cannot—claim that the employer's decision was part of a single course of conduct that "posed a substantial risk of harm to the general public" (*Williams*, 127 S. Ct. at 1064). Rather, the plaintiff's claim relates only to herself; her purpose in offering evidence of distinct conduct directed at others is to lighten the burden of persuading the jury that there was discrimination against her. Therefore, any jury that considered this evidence would be doing precisely what *Williams* forbids: "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

By insisting that other employees' allegations of discrimination be placed front and center before juries—no matter how attenuated the link to the plaintiff—the Tenth Circuit mandated a "procedure[] that create[s] an unreasonable and unnecessary risk of [jury] confusion occurring." *Id.* at 1065. For the reasons we have explained (*see* Part I(A), *supra*), that risk is both very real and wholly unnecessary.

II. THE QUESTION PRESENTED WARRANTS REVIEW SOONER RATHER THAN LATER.

As the petition details, the decision below conflicts with the decisions of at least five other circuits. *See also* EEAC/SHRM Proposed Amici Br. at 5–9 (delineating circuit split). The present case is an ideal vehicle with which to resolve the split, and there is nothing to be gained by allowing the disagreement among the courts of appeals to fester further.

To the contrary, so long as this division is allowed to persist, it will have the predictable effect of encouraging employment discrimination plaintiffs to engage in forum shopping. As this Court has explained, the problem of forum shopping "is a very old one affecting the administration of the courts as well as the rights of litigants"; "when litigation is piled up in congested centers instead of being handled at its origin," courts face "[a]dministrative difficulties." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) (discussing doctrine of *forum non conveniens*, now superseded in part by statute).

Those dangers are likely to be realized if review is not granted here. Under the general venue statute (28 U.S.C. § 1391)—which applies both to the ADEA and 42 U.S.C. § 1981—venue is technically proper with respect to corporate defendants "in any judicial district in which [the corporation] is subject to personal jurisdiction. 28 U.S.C. § 1391(c). And even under the more restrictive special venue provision applicable under Title VII and the Americans with Disabilities

Act ("ADA"), venue may properly lie "in the judicial district in which the [relevant] employment records * * * are maintained and administered[.]" 42 U.S.C. § 2000e-5(f)(3) (Title VII); *see also* 42 U.S.C. § 12117(a) (provision of ADA incorporating Title VII's venue provision).

Hence, for most corporations—including *amici*—with business operations or headquarters in Colorado, Kansas, Oklahoma, New Mexico, Utah, or Wyoming, venue will likely be technically proper in judicial districts within the Tenth Circuit. As a consequence, plaintiffs surely will try to take advantage of the decision below by filing lawsuits in federal district courts within the Tenth Circuit, regardless of where the challenged action took place. And in cases in which the employment decision occurred outside the Tenth Circuit, employers will predictably—and properly—respond by moving to transfer venue pursuant to 28 U.S.C. § 1404. All of this adds up to needless work for district courts within the Tenth Circuit. By granting review and resolving the circuit split, this Court can reduce the amount of forum shopping and associated motions practice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
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